Supreme Court, U. S.
FILED
APR 16 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1580

SHEILA BROOKS, SHARON ENGELS, BARBARA GUYHTO, JOAN LEITMAN, SHEILA MARCUS, BEVERLY PIVAWER, ARLENE SONFIST, and LARENE SZESZKO,

Petitioners,

vs.

IRVING ANKER, MURRAY ROCKOWITZ, BOARD OF EDUCATION OF THE CITY OF NEW YORK, AND BOARD OF EXAMINERS OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOAN GOLDBERG
Attorney for Petitioners
275 Madison Avenue
New York, New York 10016
(212) 689-7059

2119 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases Cited:

Page

Statutes and Regulations:

United States Constitution Cited:

Other Authorities Cited:

APPENDIX

In The

Supreme Court of the United States

October Term, 1978

No.

SHEILA BROOKS, SHARON ENGELS, BARBARA GUYHTO, JOAN LEITMAN, SHEILA MARCUS, BEVERLY PIVAWER, ARLENE SONFIST, and LARENE SZESZKO,

Petitioners,

vs.

IRVING ANKER, MURRAY ROCKOWITZ, BOARD OF EDUCATION OF THE CITY OF NEW YORK, AND BOARD OF EXAMINERS OF THE CITY OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Sheila Brooks, Sharon Engels, Barbara Guyhto, Joan Leitman, Sheila Marcus, Beverly Pivawer, Arlene Sonfist and Larene Szeszko petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit which affirmed a judgment of the United States District Court for the Eastern District of New York, granting summary judgment to defendants and denying petitioners' requests to set aside the termination of their licenses and declaring invalid regulations that inhibited motherhood.

OPINIONS BELOW

The opinion of the district court is unreported. It is reproduced in Appendix A hereto. The opinion of the court of appeals has not been reported. It is reproduced in Appendix B hereto.

JURISDICTION

The judgment sought to be reviewed was entered on January 15, 1979. A motion for reargument was filed on February 15, 1979. The court requested that a motion be made to consider the motion for reargument as a petition for rehearing. Such motion was filed on February 22, 1979 and denied by the court on February 27, 1979.

QUESTIONS PRESENTED

1. Whether the Board of Education may terminate the license of a woman school teacher while she is on maternity leave that is mandated by Board of Education regulations.

2. May the district court, on a motion for summary judgment, determine without a hearing that maternity leave regulations are constitutional, when another district court, after hearing, had determined that such regulations were unconstitutional and conflicted with the decision of the Supreme Court [*Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974)].

3. Whether a burden is placed on motherhood by failing to grant women teachers on maternity leave additional time to complete licensing requirements.

STATUTES AND REGULATIONS INVOLVED

Board of Education By-Law §238.

> "6. Where time extensions are provided in these By-laws which allow completion of certain requirements beyond the date set in this section, additional time extensions shall be granted to applicants upon presentation of satisfactory proof of the following:
>
> A. Active duty in the armed forces of the United States in time of war . . . ."

Board of Education By-Law §107.

> "1. As soon as any regular or non-regular employee in the teaching staff shall become aware of her pregnancy, she shall apply for a leave of absence for the purpose of maternity and child care. The initial date of the leave shall be set as follows: Either (a) the employee may go on leave of absence status forthwith or (b) after a physical examination of applicant by the Medical Staff of the Board of Education, she may remain on duty to a date to be specified and recommended by applicant's physician, if approved by the Director of the Medical Staff.
>
> 7. Failure by an employee to comply with any of the regulations shall be deemed neglect of duty and an act of insubordination".

Special Circular No. 13, 1970-71.

> "1. *Leaves of Absence for Maternity and Child Care*

It is the duty of a principal or other supervisor who becomes aware of the pregnancy of a teacher under his supervision to remind her of the foregoing provisions and to exert every effort to prevail upon her to comply.

A pregnant teacher who is in good health is sometimes reluctant to comply because she wishes to continue teaching as long as possible, a desire in which her principal may concur. Both principals and teachers, however, should bear in mind that present policies of the Medical Division and the Office of Personnel are very liberal in this regard and in most cases are likely, after examination, to permit a teacher who is in good health to continue teaching until the end of the seventh month of pregnancy. Compliance with requirements, therefore, will not obviate a health hazard for the prospective mother, but will enable the principal to make timely provision for a capable teacher replacement."

STATEMENT OF THE CASE

Proceedings in the Board of Education

Petitioners, all women, took licensing examinations to become permanently appointed school teachers in the elementary schools of the City of New York, and were appointed under such licenses.

At the time of taking such examinations, they were advised that certain additional education requirements must be completed within 5 years after taking the examination. The requirements were (a) obtaining a Masters Degree; (b) completing 30 graduate school credits or (c) attaining tenure by teaching satisfactorily for three years.

None of the petitioners completed these requirements within the 5 years although three of them received their Masters Degree prior to their termination and the others made considerable progress towards completing the requirements.

All were on mandatory maternity leaves when their licenses were terminated. None was permitted to work beyond the seventh month of pregnancy (Special Circular No. 13) and none could return to work after giving birth except with consent of the Board of Education[1] (By-Laws of the Board of Education, §107).

No hearings were held, although demanded and the petitioners' licenses were automatically terminated.

The Proceedings in the District Court

Petitioners filed suit in the district court asking (1) that the license terminations be declared illegal; (2) that the Board of Education be enjoined from enforcing any conditions of employment that would place a burden on those having a child; (3) that defendant extend the period of time for petitioners to complete the academic requirements and (4) that damages be awarded for the period of time defendants were on mandatory maternity leave and that seniority be accumulated for this period of time.

Defendants denied that maternity leave was mandated and the case was submitted on cross-motions for summary judgment.

The questions before the court were (1) whether the maternity regulations denied plaintiffs due process or equal

---

1. While petitioners were on maternity leave a group of New York City teachers and social workers brought the case of *Monell v. Department of Social Services and Board of Education*, 394 F. Supp. 853 (S.D.N.Y., 1974) 98 S. Ct. 2018 (1978). None of the petitioners received notice of the class action because notice was distributed through school and all of the petitioners were on enforced leave.

protection of the law; (2) whether the licensing requirements unconstitutionally burdened women who wished to become licensed school teachers.

The court held that the maternity regulations met the requirements set forth by this Court in *Cleveland Board of Education v. La Fleur, supra,* although this was contradicted in affidavits submitted by the petitioners. Additionally, the affidavits of the defendants were false (*see* Special Circular 13). If a trial had been held, it is submitted that the district court would have reached the same decision as the *Monell* court.

The court was also asked to determine, assuming that the maternity leave regulations were constitutional, whether it was more difficult to become a licensed teacher, as a woman, because of the failure to extend the time to complete requirements while petitioners were on maternity leave. The court held that the failure to extend the period of time during which educational requirements must be completed was not unconstitutional in that it did not burden women more than men; the regulations were necessary to assure a high quality of teacher and there was no reason to believe that the rule imposed financial hardship on women on maternity leave.

The Decision of the Court of Appeals.

The Court of Appeals affirmed the decision of the district court.

REASONS FOR GRANTING THE WRIT

I.

The right to bear children is a constitutionally protected right.

As the Court held in *Eisenstadt v. Baird,* 405 U.S. 438 (1972) "there is a right to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to beget a child," at p. 453. *See also, Skinner v. Oklahoma,* 316 U.S. 535, 541; *Roe v. Wade,* 410 U.S. 113; *Griswald v. Connecticut,* 381 U.S. 497; *Meyer v. Nebraska,* 262 U.S. 390.

It would appear unquestioned that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Board of Education v. La Fleur,* 414 U.S. 632.

The question then is whether the termination of petitioners' licenses while on maternity leave conflicts with the Due Process Clause, or to put it another way, do the combined maternity rules and the failure to grant an extension of time to complete additional educational requirements needlessly, arbitrarily or capriciously infringe upon a vital area of a teacher's constitutional liberty?

It is submitted that they do.

Although it is a legitimate interest of the states to have well-trained teachers, additional education requirements that must be completed 5 years after the licensing examination is taken do not assure well-trained teachers. Nor can these additional courses be considered essential.[2]

2. Testimony would have been introduced to show the courses accepted by defendants are unrelated to teaching and or intelligence.

Persons who are inducted into the armed forces have been given an additional period of time to complete their requirements. Section 243, New York Military Law requires that their jobs be kept open for them and Board of Education By-Laws §238 grants an extension of time to complete requirements.

Moreover, a teacher on active duty receives time towards tenure and seniority and may therefore avoid taking additional courses entirely. New York Military Law, §243(9).

And further, the Board in 1978 again relaxed its rules by extending for an additional period of up to 2 years, the time for completing all education requirements for teachers on maternity leave and numerous others (§238, as amended, 1978).

The number of exceptions carved out from the rule makes it obvious that the rule is arbitrary, and unnecessary to any legitimate state interest. The question is whether it places a burden on those having children.[3]

That a woman who aspires to a career as a teacher must delay having a child until she is either tenured or has completed the additional educational requirements set forth in the licensing examination, clearly imposes a burden on a marriage, and interferes with the family's decision if and when to have children.

In addition to interfering with the decision to have a child, the maternity regulations made it more difficult for women to retain their licenses by requiring them to take a leave of absence from the end of the seventh month until permitted to return.

Had they been permitted to work until confinement, or had confinement coincided with the summer vacation, some of the petitioners would have acquired tenure and been excused from taking graduate course requirements.

3. No testimony was taken and one can only guess the basis for J. Bartel's finding.

Petitioners had to make a choice whether to have their children while young or lose their licenses. This, it is alleged, is a violation of the Due Process Clause and the writ should be granted.

II.

The case conflicts with decisions of this Court.

The decision in this case is in conflict with other decisions of this Court. This Court has affirmed that the New York City maternity leave regulations in effect at the time of petitioners' leaves, were unconstitutional and that the members of the class of pregnant women were entitled to damages for violation of their constitutional rights. (*Monell v. Department of Social Services, supra*).

If the decision below is permitted to stand, that unconstitutional regulation will have been utilized to deprive women of their teaching licenses.

III.

To render meaningful this Court's recent decision in *Orr v. Orr*, 47 U.S. Law W. 4224 (March 5, 1979), the court should be cautious in cases of employment that are claimed to burden women.

As this Court stated in that case, it is no longer solely the man's responsibility to provide a home and its essentials and "no longer is the female destined solely for the home and the rearing of the family . . ." *Stanton v. Stanton*, 421 U.S. 7, *see also, Craig v. Boren*, 429 U.S. 198.

So if women and men are both to be free to reach their full potential and women are to be equal and responsible for their own maintenance, it is incumbent on this Court to end all disparity between men and women in the marketplace.

We see no possibility for enabling men and women to be truly equal so long as there is the significant biological difference that enables only women to bear the joys and burdens of childbirth. The Court can, however, minimize career disturbance by prohibiting any change in employment status, *e.g.*, license revocation, loss of seniority, etc., while women are on maternity leave. *See Lau v. Nicholas,* 414 U.S. 563 re discriminatory effect.

The regulation requiring completion of academic preparation requirements within 5 years, while apparently gender-neutral, in reality handicaps women in pursuit of teaching careers and denies them equal protection of the law.

The Fourteenth Amendment requires school boards to employ alternate means which do not so broadly infringe upon basic constitutional liberty in support of their legitimate goals.

IV.

There is a conflict in the circuits as to whether untenured teachers may be treated differently from tenured teachers with regard to maternity leave.

In *Heath v. Westerville Board of Education,* 345 F. Supp. 501 (D.C. Ohio, 1972), the school board permitted tenured teachers to take maternity leave, but required untenured teachers to resign.

The court, in its opinion stated that there was no rational reason for the distinction. *See also, Jinks v. Mays,* 332 F. Supp. 254, *aff'd in part and remanded in part,* 464 F.2d 1223 (5th Cir. 1975) for a similar result.

Yet the court below permitted petitioners' licenses to be terminated while on leave, while tenured teachers have always been free to resume their careers.

This disparity should not exist; there should be an equal right to return to work regardless of whether a teacher is licensed in Westerville, Ohio or New York City, New York.

CONCLUSION

Certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

s/ Joan Goldberg
Attorney for Petitioners

APPENDIX A — OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SHEILA BROOKS, SHARON ENGEL, BARBARA GUYHTO, JOAN LEITMAN, SHEILA MARCUS, BEVERLY PIVAWER, ARLENE SONFIST and LARENE SZESZKO,

Plaintiffs,

-against

IRVING ANKER, MURRAY ROCKOWITZ, BOARD OF EDUCATION OF THE CITY OF NEW YORK, and BOARD OF EXAMINERS OF THE CITY OF NEW YORK,

Defendants.

76-C-33

Appearances:

JOAN GOLDBERG, ESQ.
Attorney for Plaintiffs
275 Madison Avenue
New York, N.Y. 10016

HON. ALLEN G. SCHWARTZ
Corporation Counsel
Attorney for Defendants
Municipal Building
New York, N.Y. 10007
LORNA GOODMAN, ESQ.
Of Counsel

BARTELS, District Judge

Appendix A

This is an action by eight former New York City school teachers, alleging a denial of due process and equal protection in the termination of their teaching licenses. Plaintiffs move, and defendants cross-move, for summary judgment pursuant to F.R.Civ.P. 56. Jurisdiction over this action arises under 28 U.S.C. §1343 and 42 U.S.C. §§1983 and 1985. *Monell v. Department of Social Services of the City of New York*, No. 75-1914 (U.S. June 6, 1978).

FACTS

Between February 1968 and September 1969, plaintiffs, who are all women, were granted conditional licenses to teach in New York City public schools. Plaintiffs received these licenses as a result of successfully completing competitive examinations administered by the defendant New York City Board of Examiners. At the time of applying to take their respective examinations, and again at the time of examination, plaintiffs were given written notice that retention of their teaching licenses would be conditioned upon completion within five years of the academic preparation requirement ("A.P.R.") prescribed by §283-b of the defendant Board of Education's by-laws. This section requires that a teacher obtain either a master's degree or thirty credits beyond an undergraduate degree in order to become permanently licensed. As an alternative, a teacher satisfactorily completing three years of probationary teaching may obtain tenure and continue to teach without completing the A.P.R.

During the five-year period within which they were to have completed the A.P.R., seven of the eight plaintiffs became pregnant.[1] As a result of their pregnancies, plaintiffs were

1. One plaintiff, Barbara Guyhto, became pregnant after the termination of the five-year period within which she was to have completed the academic preparation requirement. During that five-year period, Guyhto took a leave to

(Cont'd)

Appendix A

required to take mandatory four-year maternity and child care leaves pursuant to §107 of the Board of Education's by-laws.[2] This section provided that upon discovering her pregnancy, a teacher would be permitted to go on leave forthwith, or to continue teaching until a date specified by her physician and approved by the Board of Education's Medical Staff. Although plaintiffs were all required to take such leaves, they were not required to remain on leave for the full four-year period. Instead, §107 provided that a teacher was eligible to terminate her leave upon certification by her physician, and concurrence by the school Medical Director, that she was in good physical condition. Once certified as fit, her leave would terminate on the first day of the following semester. Plaintiff Leitman availed herself of this opportunity, but neither she nor any of the other plaintiffs was able to complete the A.P.R. within the five-year limitation period.

As a result of their failure to complete the A.P.R. in a timely manner, plaintiffs were all notified that their conditional licenses to teach had been terminated. At least one plaintiff, Pivawer, requested an extension of time within which to complete the A.P.R., but was denied an extension on the basis of the Board of Education's policy, applied to all plaintiffs, of allowing such extensions only for time spent on leave for military service.

DUE PROCESS CLAIMS

Plaintiffs' first contention is that the four-year mandatory maternity leave burdened their fundamental right to bear

(Cont'd)

accompany her husband while he was on military duty. Plaintiffs make no assertion that Guyhto was entitled to military leave extension for that period, which would have extended the time for compliance beyond the time of her pregnancy. Without such an extension, however, Guyhto does not share the grounds asserted by the other plaintiffs as the basis for their complaint.

2. Board of Education by-law §107 was amended in November 1973 to replace the four-year leave with a six-week maternity leave, §107(3), and an optional child care leave available to both male and female teachers, §107(4).

children, and denied them due process under the Fourteenth Amendment. In making their due process argument, plaintiffs rely heavily on the opinion of the Supreme Court in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974). In *LaFleur,* two sets of maternity leave rules were at issue. One set required pregnant teachers to take an unpaid maternity leave beginning five months before the expected date of childbirth, and prevented them from returning to work until the beginning of the semester following the date on which their children had reached the age of three months. The other rules required a pregnant teacher to give notice of pregnancy six months before her expected date of delivery and begin an unpaid maternity leave four months prior to delivery. This leave was terminable upon certification by a physician that the teacher was physically fit for re-employment, and upon her assurance that care of the child would cause only minimal interference with teaching duties.

The Court reviewed these rules, and held that "because public school maternity leaves directly affect [the decision to bear children], 'one of the basic civil rights of man' . . . the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty." 414 U.S. at 640, citing *Skinner v. Oklahoma,* 316 U.S. 532 (1942). The Supreme Court further held that the rules before it were unconstitutional insofar as they arbitrarily required a teacher to go on maternity leave four or five months before the expected date of delivery, and prevented her from returning to work before her child had reached three months of age, all without any regard to the teacher's individual physical capacity and ability to work. However, insofar as the challenged rules permitted a teacher to return to work at the beginning of the first semester following medical certification of fitness, they were upheld as constitutional.

The distinction between the rules which were upheld in *LaFleur,* and those which were struck down, was that the former provided for an individualized determination of fitness, while the latter arbitrarily and irrebutably presumed that all pregnant teachers were alike in their ability or inability to work. Unlike the unconstitutional rules in *LaFleur,* the maternity leave policies challenged here provide exactly the type of individualized determination in both the commencement and early termination of the four-year leave which the due process clause requires. Rather than applying arbitrary and capricious presumptions, defendants have provided flexibility and individualization, and have fully protected plaintiffs' right to due process.

EQUAL PROTECTION CLAIMS

Plaintiffs also contend that defendants, by requiring them to take maternity leaves while denying them extensions of time within which to complete the A.P.R. placed them in a disadvantaged class of teachers having less than a full five years for completing that requirement and thereby denied plaintiffs' Fourteenth Amendment right to equal protection.

The equal protection clause of the Fourteenth Amendment demands that when the state treats individuals as a class, it do so in such a manner "that all persons similarly circumstanced shall be treated alike." *Reed v. Reed,* 404 U.S. 71 (1971); *Royster Guano Co. v. Virginia,* 258 U.S. 412 (1920). When state classifications "approach sensitive and fundamental rights" a court must ask: "What legitimate state interests does the classification promote?" and "What fundamental rights might the classification endanger?" *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 173 (1972). In cases such as this, involving classifications based on pregnancy and implicating the fundamental right of procreation, courts have not applied "strict scrutiny," but have required that the state's classification bear a

rational relationship to the interest being served. *Crawford v. Cushman,* 531 F.2d 1114 (2d Cir. 1976). *See also Geduldig v. Aiello,* 417 U.S. 484 (1974).

While it is true that defendants in this case did classify plaintiffs on the basis of pregnancy, requiring them to take mandatory maternity leaves, we do not find that that classification had any effect on plaintiffs' fundamental right to bear children. Nothing in the terms or conditions of plaintiffs' leaves prohibited or prevented them from pursuing the studies necessary to complete the A.P.R. Moreover, plaintiffs were free to seek early termination of their leaves and could have returned to teaching in time to obtain tenure by satisfying the alternative three-year teaching requirement.[3] Defendants did not impose a special burden on plaintiffs by virtue of their pregnancies, but merely held them to the same standard of preparation required of all teachers without regard to pregnancy. To the extent that this burdened plaintiffs' decision to bear children, it was not the result of an invidiously discriminatory classification but was rather an incidental effect of a requirement rationally related to defendants' legitimate interest in maintaining a high level of education and training among New York City public school teachers. There was more than ample time for plaintiffs to satisfy the §283-b requirement in spite of their pregnancy.

Plaintiffs contend that even if defendants' classification of them on the basis of pregnancy did not actively discriminate

3. Had plaintiffs been compelled to take a four-year maternity leave without any opportunity to return to work, the loss of income which would have resulted from their non-pay status might have created an undue financial burden on plaintiffs' pursuit of additional education. However, plaintiffs were eligible to return to work as per diem substitutes (which at least three plaintiffs did), and were eligible to terminate their leaves and return to full teaching duties. Plaintiffs have offered no evidence that in this case their leaves created a financial burden on their completion of the A.P.R., and the facts before us do not demonstrate that any such burden existed.

against them, defendants' refusal to grant extensions for completing the A.P.R. constituted a denial of equal protection. Plaintiffs do not contend that they are treated less favorably than teachers required to take leaves for temporary disabilities other than pregnancy. *Compare Geduldig v. Aiello, supra; Crawford v. Cushman, supra.* Defendants deny extensions to teachers taking health related leaves or leaves for other personal reasons just as they deny extensions to those taking maternity leaves. *See e.g. Garfield v. Scribner,* 39 App. Div. 602, 332 N.Y.S.2d 88 (2d Dept. 1972); *Matter of Niederhoffer,* 12 Ed. Dept. Rep. 42 (1972); *Matter of Turetsky,* 7 Ed. Dept. Rep. 117 (1967). However, because defendants do grant extensions to teachers taking leaves for military service, plaintiffs contend that they have been irrationally excluded from the class of teachers to whom extensions are granted, and have thereby been denied equal protection.

Having babies is of course not in the same category as rendering military service. It is not merely that teachers taking leave for military service must involuntarily absent themselves from their studies and teaching which justifies the extensions granted to them. Rather, it is the state's legitimate and well recognized interest in encouraging its defense through encouraging participation in the armed services, and rewarding those whose lives have been disrupted because they have served, which justifies the protection afforded to veterans by granting them extensions of time within which to complete the A.P.R. *See Anthony v. Commonwealth of Massachusetts,* 415 F.Supp. 485 (D.Mass. 1976), *vacated on other grounds sub nom. Massachusetts v. Feeney,* 434 U.S. 884 (1977); *August v. Bronstein,* 369 F.Supp. 190 (S.D.N.Y. 1974). Extensions for military leaves, in compliance with New York Military Law §243 (McKinney 1972), involves a classification of benefits rationally related to a legitimate state interest. The mere fact that plaintiffs do not fit within that rationally distinguishable class does not constitute a denial of equal protection.

Appendix A

On the undisputed material facts before us, we find that defendants have not deprived plaintiffs of due process and have not denied them equal protection. Accordingly, defendants' motion for summary judgment must be granted, and plaintiffs' motion denied.

SO ORDERED.

Dated: Brooklyn, N.Y.,
July 5, 1978.

s/ John R. Bartels
United States District Judge

APPENDIX B — OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of January, one thousand nine hundred and seventy-nine.

Present:

HONORABLE IRVING R. KAUFMAN,
Chief Judge.

HONORABLE HENRY J. FRIENDLY

HONORABLE J. JOSEPH SMITH,

Circuit Judges,

SHEILA BROOKS, SHARON ENGELS, BARBARA GUYHTO, JOAN LEITMAN, SHEILA MARCUS, BEVERLY PIVAWER, ARLENE SONFIST and LARENE SZESZKO,

Appellants,

v.

IRVING ANKER, MURRAY ROCKOWITZ, BOARD OF EDUCATION OF THE CITY OF NEW YORK, and BOARD OF EXAMINERS OF THE CITY OF NEW YORK,

Appellees.

Appendix B

78-7416

FILED
JAN. 15, 1979
A. DANIEL FUSARO, CLERK

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Judge Bartels. On the pleadings and papers submitted before the District Court there was no issue before Judge Bartels as to whether the Board's regulations were in fact followed in practice during the period in question.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

s/ Henry J. Friendly
HENRY J. FRIENDLY

s/ J. Joseph Smith
J. JOSEPH SMITH,
Circuit Judges.

APPENDIX C — ORDER DENYING MOTION

UNITED STATES COURT OF APPEALS

Second Circuit

78-7416
1696

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-seventh day of February, one thousand nine hundred and seventy-nine.

SHEILA BROOKS, SHARON ENGEL, BARBARA GUYHTO, JOAN LEITMAN, SHEILA MARCUS, BEVERLY PIVAWER, ARLENE SONFIST and LARENE SZESZKO,

Plaintiffs-Appellants,

v.

IRVING ANKER, MURRAY ROCKWITZ, BOARD OF EDUCATION OF THE CITY OF NEW YORK, and THE BOARD OF EXAMINERS OF THE CITY OF NEW YORK,

Defendants-Appellees.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated February 22, 1979 for leave to file motion for reargument as a petition for rehearing be and it hereby is denied.

Appendix C

It is further ordered that

IRVING R. KAUFMAN,
Chief Judge.

HENRY J. FRIENDLY

J. JOSEPH SMITH
(per IRK) Circuit Judges

Supreme Court, U. S.
FILED
MAY 22 1979
MICHAEL RODAK, JR., CLERK

78-1580

IN THE
SUPREME COURT OF THE UNITED STATES

SHEILA BROOKS, SHARON ENGELS, BARBARA GUYTHO, JOAN LEITMAN, SHEILA MARCUS, BEVERLY PIVAWER, ARLENE SONFIST, and LARENE SZESZKO,

Petitioners,

-against-

IRVING ANKER, MURRAY ROCKOWITZ, BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EXAMINERS OF THE CITY OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ALLEN G. SCHWARTZ,
Corporation Counsel of
The City of New York,
Attorney for Respondents,
100 Church Street,
New York, New York 10007
(212) 566-4338 or 4072

CAROLYN E. DEMAREST,
ALEXANDER J. WULWICK,

of Counsel.

Cases Cited

United States Constitution

Statutes

INDEX

IN THE
SUPREME COURT OF THE UNITED STATES

SHEILA BROOKS, SHARON ENGELS, BARBARA GUYHTO, JOAN LEITMAN, SHEILA MARCUS, BEVERLY PIVAWER, ARLENE SONFIST, and LARENE SZESZKO,

Petitioners,

-against-

IRVING ANKER, MURRAY ROCKOWITZ, BOARD OF EDUCATION OF THE CITY OF NEW YORK and BOARD OF EXAMINERS OF THE CITY OF NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioners, women teachers in the New York City public schools, were granted their provisional teaching licenses between February, 1968 and September, 1969 after successful completion of competitive examinations administered by the repondents. Petitioners were notified that retention of the licenses was conditioned upon completion of certain academic requirements within five years of the date specified in the examination announcement. Failure to comply with this condition would result in termination of the license.

The necessary academic preparation requirements were and are either the attainment of a Master's Degree or completion of 30 hours of graduate study. Alternatively, if a teacher satisfactorily completed three years of probationary teaching, she could obtain tenure and teach without fulfilling the requirements. In addition to being informed of the five year time period within which to satisfy the eligibility requirements, plaintiffs were also advised in the

examination announcement that extensions of time beyond the five year period would be allowed only for military service pursuant to N.Y. Military Law §243. None of the petitioners was eligible for the extension.

During the five year period, seven of the eight petitioners became pregnant,* necessitating their taking unpaid mandatory maternity leaves of absence pursuant to Section 107 of the By-laws of the Board of Education then in effect.** However, while leave was compulsory and the suggested period of absence was four years, a teacher could, if she so desired,

*Petitioner Guyhto's time for completing the requirements, July 1, 1972, had already expired prior to her commencing her maternity leave of absence on September 8, 1972.

**Section 107 was amended November 28, 1973 to eliminate mandatory maternity leave.

continue teaching until a date specified by her physician and concurred in by the Board's medical staff, and terminate the leave any time after the birth of her child, if she was certified by her doctor and the Board to be in good health. Once so certified, she could resume teaching on the first day of the following semester.

None of the eight petitioners had completed the educational requirements or taught satisfactorily for three years within the time allotted. Consequently, between June, 1973 and June, 1975, each of the petitioners was notified of the termination of her provisional license.

Petitioners thereafter brought this action claiming denial of due process of law under the Fourteenth Amendment by virtue of their having been forced to take maternity leave without an extension

of time to fulfill the academic requirements. They further alleged a denial of equal protection, in that the rule (former Section 238 of the Board's By-laws) concerning extensions of time for completing the requirements for eligibility for a permanent license unfairly discriminated against women by not providing an extension of time on account of pregnancy. The rule, claim the petitioners, was underinclusive in limiting such extensions to those on military leave of absence and, therefore, violative of the Fourteenth Amendment.

OPINION OF THE DISTRICT COURT

Judge BARTELS denied petitioners' motion for summary judgment and granted respondents' counter-motion. He concluded that the mandatory maternity leave, in per-

mitting a teacher individually to determine her fitness to pursue her teaching duties both during and after her pregnancy, was neither arbitrary nor capricious and did not treat "all pregnant teachers alike in their ability or inability to work", citing Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974).

With respect to the equal protection claim, the District Court ruled that the classification based on pregnancy and the requirement of compulsory maternity leave had no effect on petitioners' right to bear children or their ability to complete the academic or teaching requirements. The District Court further held the refusal to allow pregnancy as a ground for extension of time to fulfill the license requirements a legitimate practice insofar as the Board also disallowed extensions for all

other reasons except military service. The exception for those on military leave, Judge BARTELS concluded, is rationally related to a legitimate state interest and is not violative of equal protection.

DECISION OF THE COURT OF APPEALS

The Court of Appeals affirmed the judgment of the District Court on the opinion of Judge BARTELS.

ARGUMENT

THIS CASE DOES NOT PRESENT ANY SUBSTANTIAL QUESTION WHICH REQUIRES CONSIDERATION BY THIS COURT

(1)

At the outset of their discussion, petitioners state the well established principle that the right to bear children is constitutionally protected. We have no quarrel with that point of law, and

we fail to see in what respect it is relevant to the instant matter. Far from infringing petitioners' constitutional right to bear children, respondents' maternity leave regulations protected such right by securing the right to return to their teaching duties upon termination of their leaves of absence. Cf. Buckley v. Colye Public Sch. Syst. 476 F. 2d 92 (10th Cir., 1973) (pregnant teachers' dismissal at end of sixth month of pregnancy held unconstitutional).

Moreover, the regulations in question were tailored to the petitioners' individual needs, in that each petitioner was permitted to continue teaching until a date specified by her physician and concurred in by the Board's medical staff, and to terminate her leave any time after

the birth of her child if she was certified by her doctor and the Board to be in good health. These regulations were fully consistent with this Court's decision in Cleveland Board of Education v. La Fleur, 414 U.S. 632 (1974). There, this Court held that "overly restrictive" mandatory maternity leave regulations establishing arbitrary cutoff dates for taking and terminating leaves of absence violated the Due Process Clause by creating an irrebuttable presumption that a woman is physically unfit to work a set number of months both before and after childbirth. Clearly, the rule applied to these petitioners was entirely consistent with the

standard established in LaFleur.*

(2)

Petitioners have not presented this Court with any sound basis for believing that the military service exception to completion within five years of the academic preparation requirements, which exception is open to both men and women teachers, was arbitrary, or unreasonable, or discriminatory with respect to pregnant

*At page 8 of their petition, petitioners assert that the "maternity regulation made it more difficult for women to retain their licenses by requiring them to take a leave of absence from the end of the seventh month until permitted to return." It should be noted, however, that they did not allege in the District Court that they were, in fact, ordered or required to take their leaves other than pursuant to the regulations in question, that is, on an individual basis. Indeed, the Court of Appeals expressly found that "there was no issue before Judge Bartels as to whether the Board's regulations were in fact followed in practice during the period in question."

teachers. On the contrary, the extension of time based on Section 243 of the New York Military Law, is rationally related to the legitimate governmental interest in providing special protection for those who leave their jobs to serve in the military, thereby securing the State's defense. See New York City Bd. of Educ. v. New York State Hum. Rts. Div., 54 AD 2d 656, 387 N.Y.S. 2d 873 (1st Dept., 1976).

Pregnancy was not the only disability for which an extension of time was not allowed. Neither illness, hospitalization, death or sickness in the family, nor the counterpart of maternity leave for fathers-child care leave-constituted grounds for granting an extension. Hence, petitioners have been given the same treatment accorded all other members of the class of teachers, regardless of sex.

"Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation ... on any reasonable basis, just as with respect to any other physical condition." Geduldig v. Aiello, 417 U.S. 484, 496-497, n. 20 (1974). Although pregnancy leave necessarily affects only one sex, as long as a rational basis for the rule can be demonstrated, there exists no violation of petitioners' rights to equal protection. The mere fact that respondents now permit extensions for maternity leave does not undermine the legitimacy of the earlier policy. This Court has held that "consistently with the Equal Protection Clause, a State 'may

take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. ...' Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955); Jefferson v. Hackney, 406 U.S. 535 (1972)." Geduldig v. Aiello, 417 U.S. 484, 495 (1974); accord, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976); Dandridge v. Williams, 397 U.S. 471 (1970).

Finally, we would note that petitioners have not demonstrated how the Second Circuit's affirmance conflicts with the decisions of this or any other court.

Conclusion

The petition for a writ of certiorari should be denied.

May 18, 1979

Respectfully submitted,

ALLEN G. SCHWARTZ,
Corporation Counsel of the
City of New York,
Attorney for Respondents.

CAROLYN E. DEMAREST,
ALEXANDER J. WULWICK,

of Counsel.